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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 876

In the Matter of the Petition

of

WILLS LINES, INC.
for exemption from, or limitation of, liability,

Petitioner,

TANKPORT TERMINALS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR TANKPORT TERMINALS, INC. IN OPPOSITION

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Opinions Below

The decision of the District Court (petitioner's supplemental appendix, pp. 24a-30a) on the issue of liability is unreported. The order of the District Court (record, pp. 398-399) denying petitioner's motion to vacate the order of reference to appraise the MAYFAIR appears in petitioner's appendix at pages 10a-11a. The order of the District Court (Clancy, *J.*) overruling exceptions to the Commissioner's report on the issue of valuation appears in the record at pages 476-478. The opinion of the Court of Ap-

peals for the Second Circuit (petitioner's appendix, pp. A3-A9) is not yet reported.

The opinion of the District Court (petitioner's appendix, p. A-1) denying petitioner's motion to surrender the MAYFAIR is unreported. The order of the Court of Appeals for the Second Circuit (petitioner's appendix, p. A-3) summarily affirming the District Court is unreported.

The decision of the Court of Appeals dismissing appeals for lack of jurisdiction is reported at 227 F. (2d) 509; cert. den. 351 U. S. 917.

Jurisdiction

Jurisdiction with respect to the order of October 8, 1953 is lacking for untimeliness. Jurisdiction over the other issues is under 28 U. S. C. 1254(1).

Questions Presented

1. Whether this Court will review the concurrence by the court below in the Trial Court's conclusion of negligence and the findings of fact upon which it was based, the resolution of which facts was in large part dependent upon an appraisal of the credibility of the witnesses appearing before the District Court and upon the weight to be given to conflicting evidence in a negligence case.

2. Whether in the absence of any regulation requiring owners of docks, approved by the Army Engineers and the Secretary of War, to sound fog signals, it is advisable for the courts to intervene and impose such a regulation before some authority competent to deal with the subject determines whether such regulation will be a help or hindrance to navigation.

3. Whether a ship owner, in a limitation of liability proceeding, who proceeds by filing an *ad interim* stipulation and obtains an injunction against all possible claimants thereby receiving all the benefits of such procedure may then be permitted to surrender the vessel in substitution for the *ad interim* stipulation and the valuation method of procedure.

4. Whether a party who has consented to a reference to fix the valuation of a vessel in a limitation of liability proceeding may thereafter attempt to avoid such reference and whether a District Court is precluded from referring the issue of damages to a Commissioner in spite of the long practice of doing so in such cases in accordance with this Court's Admiralty rules.

5. Whether this Court should interfere with the affirmance by the Court below of the District Court's confirmation of the Commissioner's valuation of the MAYFAIR based on conflicting evidence and decided in accordance with the principles laid down by this Court in valuation cases.

Statutes and Rules of This Court Involved

The statutes and rules involved are 46 U. S. C. 183(a) and 185 and Admiralty Rules 43, 43½, 51 and 52 of this Court.

Statement

A. Liability for the casualty.—The District Court, sitting in Admiralty, after seeing and hearing the witnesses, issued its findings of fact and conclusions of law holding petitioner solely liable for the damages occasioned to the dock, of which respondent Tankport Terminals, Inc., was

the lessee in possession when it was struck by petitioner's motor vessel MAYFAIR on January 15, 1953 at about 8:15 p. m. The Court below affirmed the findings of the District Court and held that the District Court's "conclusion of negligence based upon the findings was right" (A, p. A7).* The only witnesses to the collision were members of the crew of the MAYFAIR and the facts with respect thereto necessarily had to come from the petitioner's witnesses.

The following facts appear in the opinion below, the findings of the District Court (concurred in by the Court below) and the record:

"At about 8:00 p. m. on January 15, 1953, with the mate with him in the pilothouse and a seaman on bow lookout, the Master warped the MAYFAIR around the head of the Bedloe's Island dock until her prow was in the usual alignment with the Bedloe's Island channel on a southwesterly heading.

"The MAYFAIR had just commenced to gain headway at a speed of approximately three knots when it was enveloped suddenly by dense fog which afforded no visibility. The Master posted appropriate lookouts and blew his whistle in long blasts at one-minute intervals. The testimony and available evidence of the maneuvers of the vessel between this time and the moment of impact with claimant's pier 10 to 15 minutes thereafter are neither clear nor convincing. I am convinced, however, that at the moment of impact, or immediately before, the vessel

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* Pet. Ap.—refers to Petitioner's Appendix in the Court below;
Pet. Supp. Ap.—refers to Petitioner's Supplemental Appendix in the Court below;
A.—refers to the Petitioner's separate appendix;
RA.—refers to Respondent's appendix included in its brief to the Court below;
R.—refers to the original record.

was under power and was proceeding in an improper direction at slow speed and that this was the proximate cause of the collision with claimant's pier. Assuming, as the captain testified he ascertained at the time of impact, that the ship was drifting for 10 to 15 minutes immediately prior to the moment of impact, his failure to drop a lead line or to take other precautions to ascertain and counteract drift, was an act of negligence which constituted a proximate cause of the casualty. The failure of the master to stop the vessel and avoid further navigation and prevent movement of his vessel until the fog lifted were proximate causes of the casualty.

"On the evening of January 15, 1953, at about 8:15 p. m., the MAYFAIR collided with the northerly side of the aforesaid dock at a point about 500 feet inshore from the sea end of the dock, penetrating the said dock for a distance of five to six feet with her stem and bow, causing damage to the dock and the loss of petroleum products. • • • (Pet. Supp. Ap. 28a-29a.)

"The dock of Tankport Terminals, Inc. was properly situated, conducted and maintained" (Pet. Supp. Ap., p. 30a). "• • • No part of it jutted out into the navigable channel • • •. The petitioner's contention that claimant's dock constituted a menace to navigation is utterly lacking in support in the record" (A., pp. A5, A8).

At the time of the collision, "the current was running in a northeasterly direction from the dock toward Bedloe's Island" (A., p. A7); that is, the MAYFAIR had to proceed against the current to contact the dock.

"• • • the Mayfair collided with the claimant's dock coming upon it with considerable force bow on, at right angles" (A., p. A5), as a result of which "the dock sustained serious damage" (Pet. Supp. Ap. 29a). The force

of the collision was sufficient to push the dock office some 15 or 20 feet (R., p. 2a), cut in half one 14 inch pipe line, flatten a 10 inch pipe line, bend two 6 inch pipe lines, and sever a 4100 volt power line, as well as other service lines, such as water, telephone and fire alarm system (R. 566; see photographs, exhibits 5A to E). The impact was of such nature that even though the MAYFAIR had an iron hull (R. 447), her master immediately dispatched a man onto the dock to see whether she had been "holed" or "punctured" (Petitioner's Brief below, pp. 7 and 13).

B. Facts dealing with petitioner's election to file an *ad interim* stipulation.—Following the collision on January 15, 1953 petitioner as owner of the MAYFAIR filed its petition in the District Court on March 31, 1953 for exoneration from or limitation of liability (R. 286-292a; Tankport Terminal's appendix below, pp. 20a-26a) praying that due appraisement be made of its interest in the MAYFAIR and pending freight; that the Court make an order directing petitioner to file a stipulation with approved surety for the payment into Court of the amount of the petitioner's said interest; that the Court make an order directing the issuance of a monition to all persons claiming damages and, that the Court make an order directing that upon the giving of such stipulation as may be determined to be proper or of an *ad interim* stipulation, an injunction issue restraining the prosecution of all suits arising out of the accident in question except in the present proceeding.

On the same day, based on affidavits presented to establish the value of the vessel, the District Court ordered an *ad interim* stipulation to be filed in the sum of $15,056.25 and further ordered that any party might apply to have the amount of said stipulation increased or diminished as the case might be, upon the filing of the report of the Com-

missioner appointed to appraise the amount of the value of petitioner's interest in said vessel, or upon the ultimate determination of the Court upon exceptions to the Commissioner's report (Tankport Terminal's appendix below, pp. 7a-8a). Also upon the same day, upon application of petitioner, the District Court entered an order restraining all suits except in this proceeding (Tankport Terminal's appendix below, pp. 9a-11a).

Thereafter on May 15, 1953 an order was entered on consent of petitioner referring the matter of appraising the value of the petitioner's interest in the MAYFAIR to a Commissioner (Tankport's supplemental appendix below, pp. 13a-14a). Following the entry of this order respondent on July 30, 1953 brought on for hearing before the Commissioner the issue of the appraisal of the MAYFAIR. Petitioner then moved to amend its petition and for an order appointing a trustee to take title to the MAYFAIR in substitution for the *ad interim* stipulation already filed in this proceeding. This motion was denied by order dated September 29, 1953 (A., p. A1) and summarily affirmed by the Court below on October 8, 1953 (A., p. A2). By petition dated October 28, 1953, petitioner in this Court filed an "application for stay pending certiorari proceedings" which was denied by Mr. Justice Jackson on November 3, 1953. Petitioner did not thereafter file a petition for a writ to review the order of October 8, 1958 of the Court below nor did it take other steps to appeal from this order and, the time to do so has now long expired.

C. The Valuation of the MAYFAIR.—The Court below stated that "in view of the conflicting evidence presented to the commissioner, we find nothing to warrant reversal of the $30,000 value" (A., p. A6).

The Commissioner after hearing the testimony of the witnesses that appeared before him came to the conclusion

that the value of the MAYFAIR as of January 15, 1953 was $30,000; his report appears in petitioner's appendix below (pp. 12a to 19a). The Commissioner in arriving at his conclusion properly applied the principles laid down by this Court in *United States* v. *Toronto, Hamilton and Buffalo Nav. Co.*, 338 U. S. 396 (Pet. ap. 13a) to the facts presented to him.

A few of the facts presented disclosed that "the MAYFAIR was mortgaged to the Reconstruction Finance Corporation together with the other vessels involved in the Statue of Liberty run for a total of $245,000 of which $40,000 was allocated to the MAYFAIR" and that the "MAYFAIR earned between $15,000 and $24,000 per year" (PA., p. 17a).

Argument

1. *Petitioner's liability for the collision.*—The issue of whether the petitioner was negligent in colliding with the dock was based on questions of fact, the resolution of which depended in part on an appraisal of the credibility of the witnesses that appeared and testified before the District Court and upon an evaluation of certain conflicting evidence.

The moving MAYFAIR having come into contact with the dock, a fixed object, a presumption of fault arose against her and imposed on petitioner the duty to come forward with evidence to meet the presumption. (*Wetmore* v. *The Granite States*, 3 Wall. (70 U. S.) 310, 314; *Clarence P. Howland* (2 Cir. 1926), 16 F. (2d) 25; *Koch-Ellis etc.* v. *Sewerage & Water Board* (5 Cir. 1955), 218 F. (2d) 771, 772 note 3 (2); *Carr* v. *Hermosa Amusement Corporation Limited*, 137 F. (2d) 983, 985.) This rule is equally applicable where the casualty occurs during fog. (*The*

Providence (2 Cir. 1933), 67 F. (2d) 865; *P. R. R. No. 457*, 25 F. Supp. 846, 846-7, modified (2 Cir.), 103 F. 2d 428 cert. den. 308 U. S. 591; *P. R. R. No. 5* (2 Cir.), 181 F. 833.)

Although under an obligation to rebut the presumption arising in the circumstances, the only explanation made by petitioner was that the MAYFAIR was brought into collision with the dock by drifting with the currents and eddies and that this condition was not, and could not have been ascertained by the master. That she could have drifted into a dock against an adverse current, is physically impossible; and even if she were drifting, this could have been readily ascertained and stopped by dropping her anchors, or counteracted by using her engines (A., p. A7).

The MAYFAIR's master repeatedly asserted that he was stopped in the water and did not know he was moving (RA., 9a-10a). It is implicit in his evidence that he should not have been moving at all under existing weather conditions. A former Coast Guard officer called by petitioner testified that any drift could have been ascertained by the use of a lead line and controlled by the use of the vessel's anchor and engines and that under existing conditions the MAYFAIR should have dropped her anchor (RA. 11a-14a). The Court below concurred in the District Court's findings based on this testimony (A., p. A7).

Title 33 U. S. C. 192 contains the following:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

This statute and its counterpart in the International Rules (33 U. S. C. 145m) have been interpreted in numerous decisions to mean that during fog a vessel must proceed no

faster than will permit her to stop within the distance of visibility. (*The Nacoochee*, 137 U. S. 330, 339; *The Chattahoochee*, 173 U. S. 540, 548; *The Southern Cross* (2 Cir. 1937), 93 F. (2d) 297, 299; *The Providence* (2 Cir.), 67 F. (2d) 865; *The P. R. R. No. 5* (2 Cir. 1910), 181 F. 833; *P. R. R. No. 457*, 25 F. Supp. 846-7, modified (2 Cir.) 103 F. (2d) 428, cert. den. 308 U. S. 591.) "The force of the collision and the damage done would indicate excessive speed, considering the fog" (*N. Y. C. R. Co.* v. *City of New York*, 19 F. (2d) 294, 295; see also *The Youngstown*, 40 F. (2d) 420, 421).

This rule for speed in fog applies as well to ferries as to other vessels. (*Penn. R. R. Co.* v. *C. R. R. of N. J.*, 103 F. (2d) 428, 429, cert. den. 308 U. S. 591.) To the same effect, see *The Providence, supra; New York Central R. Co.* v. *New York, supra; The Youngstown, supra.* The adverse current and physical incidents of the collision support the conclusion that the speed of the MAYFAIR was negligent in view of the existing conditions.

Under petitioner's second question, it argues that the dock should have been so equipped as to give out some audible signals during fog. We know of no requirement either by statute or admiralty law which requires a dock owner to sound a signal (see *P. R. R. No. 457, supra*). It is not suggested whether the required signal should be by whistles or bells as required of vessels during fog (33 U. S. C. 191). However, it seems obvious that if every dock owner in New York Harbor sounded the bells required of vessels at anchor, it would result in hopeless confusion to navigation since a moving vessel would not know whether she was approaching a vessel in the channel or a dock.

2. *Petitioner is precluded from using the method of surrendering the vessel as security after having elected to post*

security for the vessel and obtaining an injunction and all the benefits arising out of this method of procedure.—We believe that the time within which the petitioner may ask for a review of this issue has long expired; it failed to request a review of the affirmance by the Court below of the District Court's denial of its motion, after making an application to this Court to stay the hearings before the Commissioner pending an application in this Court for a writ. But even if petitioner is not precluded from raising the issue at this time, the Court below properly passed on this issue.

There appears to be no reason for granting certiorari in this case as the law is perfectly clear. The statute (49 Stat. 1480, 46 U. S. C. 185) declares that a petitioner seeking the benefits of the Limitation of Liability Statute has the option of either filing security to the extent of the owner's interest in the vessel or of surrendering the vessel to a trustee appointed by the Court. A petitioner must choose which course of action it wishes to follow and once it has done so, "all claims • • • against the owner • • • shall cease" and consequently the election becomes irrevocable.

There is no conflict between the decision of the Seventh Circuit in *Ohio Transp. Co.* v. *Davidson SS. Co.* (1906), 148 Fed. 185, cert. den. 203 U. S. 593, and the decision of the Second Circuit in the *Ontario No. 1*, 80 F. (2d) 85. In fact, the decision of the Second Circuit in the *Ontario* case, as can be seen at page 87, relies in part upon the dictum in the Seventh Circuit case. See also *In re Morrison*, 147 U. S. 14; *H. F. Dimock*, 52 F. 598. Whatever doubt there may have been on this point prior to the decisions in both the *Ohio Transp. Co.* and *Ontario* cases was completely dispelled by the amendment to the statute (46 U. S. C.

185) in 1936, which explicitly codified the rule of irrevocability enunciated in the *Ontario* case.

3. ***Petitioner may not object to a reference on the valuation issue to which it consented nor is the Trial Court precluded from referring the issue of damages to a Commissioner.***—The order of reference to the Commissioner, dated May 15, 1953, was granted "upon consent" (Tankport's Sup. App. below, p. 13a). In addition the proceedings instituted by the petitioner contemplated the appointment of a Special Commissioner to fix the value of the M/V MAYFAIR for limitation purposes (see "Wherefore" clause in petition, R. 286-292a); *ad interim* stipulation (R. pp. 296-7).

The District Court has power and jurisdiction both to order the appointment of a Special Commissioner for the purpose of assessing the value of a vessel in a limitation proceeding as well as for the purpose of assessing the damage following an interlocutory decree. (Supreme Court Admiralty Rules 51 and 52, and 43 and 43½; *Weeks Crane No. 3*, 1935 A. M. C. 549 (not otherwise reported); *Morrison* v. *District Court of the United States*, 147 U. S. 14, at p. 20; *United States* v. *Kirkpatrick*, 186 F. 2d 393, 398; *The Dona Aurora* (2 Cir.), 206 F. (2d) 651, 7; 3 Benedict on Admiralty (6th Ed.) Sec. 500, pp. 432-433.)

4. ***The Court below properly affirmed the District Court's order sustaining the Commissioner's value of the MAYFAIR at $30,000.***—The Commissioner applied to the facts the principles laid down by this Court in *U. S.* v. *Toronto, Hamilton & Buffalo Nav. Co.*, 338 U. S. 396 (see Commissioner's report PA., p. 13a).

Petitioner's major complaint is that the Commissioner disregarded the evidence with respect to acquisition cost

of the MAYFAIR and comparative sales of other vessels. However, the following appears in the Commissioner's report: "In determining her value, I have considered the following: 1. cost to the petitioner, plus improvements, less depreciation; 2. sales of other vessels • • • " (PA., p. 14a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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